

Fruehauf Trailer Services, Inc., a wholly owned subsidiary of Wabash National Corporation and International Association of Machinists and Aerospace Workers, District Lodge 160, AFL-CIO, affiliated with International Association of Machinists and Aerospace Workers, AFL-CIO.
Cases 19-CA-25715 and 19-CA-26262

June 25, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND
WALSH

On June 3, 1999, Administrative Law Judge Steven Charno delivered a bench decision in this proceeding and on June 18, 1999, he issued a decision and certification, certifying the accuracy of that portion of the transcript containing his decision, as amended, and issuing a recommended remedial order. The General Counsel and the Charging Party each filed exceptions and supporting briefs, and the Respondent filed limited cross-exceptions, a supporting brief, and briefs in response to the General Counsel's and Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The primary issues raised by the Respondent's and the General Counsel's exceptions are: (1) whether the judge erred in finding that a settlement agreement did not encompass certain presettlement conduct; and (2) whether the judge, having found no postsettlement unfair labor practices, erred in failing to reinstate the settlement agreement that the Regional Director had set aside. For the reasons set forth below, we reverse the judge on both issues.¹

Background

The Respondent, an admitted successor employer, recognized the Union in April 1997 as the bargaining representative of the service and maintenance employees employed at its Seattle, Washington facility. Although the parties thereafter engaged in negotiations, they did not reach agreement on a collective-bargaining agreement.

On January 23, 1998,² the Union filed a charge in Case 19-CA-25715, alleging that the Respondent violated Section 8(a)(1) by offering employees improved wages

and benefits if they decertified the Union, and violated Section 8(a)(5) by bypassing the Union and dealing directly with employees. That charge was subsequently amended on September 18, and settled by an informal settlement agreement approved by the Regional Director on October 2. In the settlement agreement, the Respondent did not admit committing any unfair labor practices, but agreed to post a notice stating that it would not "tell employees that the only way to get a wage increase or profit sharing is to go non-union"; that it would not "take employees to our non-union facilities to induce bargaining unit employees to decertify the Union"; and that it would not "in any manner interfere with the exercise of the [Section 7] rights by our employees."

Thereafter, on November 23, a decertification petition was filed in Case 19-RD-3392. On November 30, the Respondent notified the Union by letter that it had received the petition in Case 19-RD-3392, as well as a copy of an employee petition rejecting the Union that was signed by a majority of the unit employees. The letter stated that the Respondent was "prevented by law" from any further collective bargaining with the Union.

On December 10, the Union filed a charge in Case 19-CA-26262, alleging that the Respondent violated Section 8(a)(5) by refusing to bargain and violated Section 8(a)(1) by offering financial incentives to employees in order to encourage decertification. The charge was subsequently amended on January 21 and March 31, 1999.

On March 31, 1999, the General Counsel set aside the October 2 settlement agreement and issued a consolidated complaint in Cases 19-CA-25715 and 19-CA-26262. The complaint alleged that in mid-November the Respondent violated the terms of the settlement agreement, and Section 8(a)(1) of the Act, by offering employees a wage increase if they decertified the Union. The complaint also alleged that the Respondent committed several presettlement violations of Section 8(a)(1) and (5) by promising employees benefits and dealing directly with them. Finally, the complaint alleged that the Respondent committed a postsettlement violation of Section 8(a)(5) and (1) by withdrawing recognition from the Union and refusing to bargain.

In his bench decision, the judge found that the Respondent did not commit any presettlement or postsettlement violations of Section 8(a)(1). He further found, however, that on September 18, 1998, the Respondent bypassed the Union and dealt directly with employees in violation of Section 8(a)(5) when a supervisor told an employee that the supervisor would look into the matter of providing a better medical program (the "bypassing" violation). The judge rejected the Respondent's argument that this allegation of presettlement conduct should

¹ In its exceptions, the Charging Party contends that the judge erred in failing to find lead man Rick Perkins to be a supervisor. We find no merit in this contention.

² All dates are in 1998, unless otherwise specified.

be dismissed on the ground that it was resolved by the settlement agreement. The judge found instead that the bypassing allegation was not within the scope of the settlement agreement.

Turning to the withdrawal of recognition issue, the judge considered whether the single bypassing violation that he had found tainted the petition the Respondent received in which a majority of employees stated that they no longer wished to be represented by the Union. Concluding that no nexus had been established between the Respondent's unfair labor practice and the Union's loss of support, the judge concluded that the Respondent lawfully withdrew recognition from, and refused to bargain with, the Union.

Finally, the judge addressed the Respondent's contention that because no postsettlement violations had been committed, the settlement agreement should be reinstated. The judge stated that if he "were to reverse the Regional Director's order there would [be] no effect, remedial or otherwise, on the outcome of this proceeding. I therefore find Respondent's argument to be moot."

Positions of the Parties

No exceptions were filed to the judge's dismissal of the unlawful withdrawal of recognition and refusal-to-bargain allegation.

With respect to the one violation that the judge found, the General Counsel concedes that it predated the settlement, but argues that it was excluded from the settlement. Contrary to his position at trial, the General Counsel now asserts that the judge correctly found that no postsettlement unfair labor practices had been committed. The General Counsel has also changed his position on the issue of whether the settlement agreement was properly set aside. In his exceptions, he contends that the judge, having found no postsettlement violations, should have reinstated the settlement agreement without making any findings concerning the settled unfair labor practice allegations.

In its limited cross-exceptions, the Respondent argues, inter alia, that the judge erred by finding that the bypassing allegation was not encompassed by the settlement agreement. The Respondent reasserts its contention that the settlement agreement should be reinstated.

Analysis

1. We address first the question of whether the judge erred in finding that the bypassing allegation was not within the scope of the settlement agreement. In *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978), the Board held that "a settlement agreement disposes of all issues involving presettlement conduct unless prior violations of the Act were unknown to the General Counsel,

not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties." As stated above, the General Counsel concedes that the bypassing violation that the judge found predated the settlement, but contends that it was excluded from the settlement. Therefore, the issue presented is whether the settlement agreement "specifically reserved" the right to litigate the presettlement bypassing allegation.

The "SCOPE OF THE AGREEMENT" clause of the settlement agreement in Case 19-CA-25715 states:

This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned cases(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

This language expressly states that the agreement settles "only the allegations" in Case 19-CA-25715 and would permit the General Counsel to proceed to litigate any case that can properly be defined as an "other" case. See *B & K Builders*, 325 NLRB 693-694 (1998) (construing the same clause). Accordingly, we must decide whether the bypassing allegation in question was one of the settled allegations of Case 19-CA-25715.

Examination of the original charge in Case 19-CA-25715 reveals that it specifically alleged that the Respondent unlawfully bypassed the Union by dealing directly with employees. By contrast, the charge and amended charges filed in the "other" case in this consolidated proceeding (Case 19-CA-26262) do not allege a bypassing violation. Therefore, the conclusion is inescapable that the bypassing allegation in the General Counsel's consolidated complaint must have been based on the charge filed in Case 19-CA-25715. Accordingly, under the plain terms of the "scope of agreement" clause, the bypassing allegation was encompassed within the parties' settlement agreement. Consequently, under *Hollywood Roosevelt*, subsequent litigation of that allegation is barred unless the settlement agreement was properly set aside. To that question we now turn.

2. As set forth above, the judge found that no postsettlement unfair labor practices had been committed, and both the General Counsel and the Respondent are now in agreement with that determination. In addition, both the General Counsel and the Respondent contend that the judge should have reinstated the October 2 settlement. We find merit in this joint contention. As the Board said in *Shell Ray Mining*, 286 NLRB 466 fn. 2 (1987), “[t]he judge found, and we agree, that the Respondent did not commit any unfair labor practices after the settlement agreement . . . was approved. Under these circumstances, the judge should have reinstated the settlement agreement and dismissed the complaint in its entirety.”

In rejecting as moot the Respondent’s request that the settlement agreement be reinstated, the judge reasoned that taking the requested action “would [have] no effect, remedial or otherwise,” on the outcome of this case, because the settlement did not encompass the bypassing allegation. However, we have determined, contrary to the judge, that the settlement agreement did encompass the bypassing allegation. Therefore, we conclude that issue is not moot and that reinstating the settlement agreement would have an effect on the outcome of this proceeding by barring the judge’s finding of a bypassing violation.

Summary

We have concluded, contrary to the judge, that the one unfair labor practice that he found was encompassed within the parties’ settlement. We have also concluded, in agreement with the judge, that no postsettlement unfair labor practices were committed. Under these circumstances, we shall, in accordance with Board policy, order that the settlement agreement be reinstated and the consolidated complaint be dismissed. *Shell Ray Mining*, supra. In so doing, we express no view on the merits of the alleged unfair labor practices predating the settlement. *Ann’s Schneider Bakery*, 259 NLRB 1151, 1160 (1982).

ORDER

It is ordered that the settlement agreement in Case 19–CA–25715 is reinstated.

The complaint is dismissed.

Patrick Dunham, Esq., for the General Counsel.
Dennis R. Homerin, Esq. and *Brian West Easley, Esq.* (*Jones, Day, Reavis & Pogue*), of Chicago, Illinois, for the Respondent.
Ted Neima, of Sacramento, California, for the Charging Party.

DECISION AND CERTIFICATION

STEVEN M. CHARNO, Administrative Law Judge. This case was tried before me in Seattle, Washington, on June 2–3,

1999. After oral argument, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board’s Rules and Regulations. Appendix A is the portion of the transcript containing my decision,¹ while Appendix B (omitted from publication) contains corrections to that transcript. In accordance with Section 102.45 of the Board’s Rules and Regulations, I certify the accuracy of the amended transcript containing my decision.

[Recommended Order omitted from publication.]

APPENDIX A

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MR. NEIMA: I assume that means they had it here. Yes.

ADMINISTRATIVE LAW JUDGE CHARNO: Yes. That it one of their exhibits in their bound volume—

MR. NEIMA: Yes.

ADMINISTRATIVE LAW JUDGE CHARNO: —that they presented on the first day of the hearing.

MR. NEIMA: Okay. Stip.

ADMINISTRATIVE LAW JUDGE CHARNO: All right. I think the record then is clear on that point. Any further clarifications?

MR. EASLEY: Not from Respondent, Your Honor.

ADMINISTRATIVE LAW JUDGE CHARNO: All right.

MR. DUNHAM: No.

MR. NEIMA: Nope.

ADMINISTRATIVE LAW JUDGE CHARNO: All right. Hearing none, I’ll give you my decision in this case.

Oral Decision and Findings of Fact

ADMINISTRATIVE LAW JUDGE CHARNO: In response to charges timely filed by the International Association of Machinists and Aerospace Workers, Lodge 160, hereinafter the Union, a complaint was issued on March 31, 1999 which alleged that Fruehauf Trailer Services, Inc., hereinafter Respondent, had violated Sections 8(a)(1) and (5) of the National Labor Relations Act as amended, hereinafter the Act. Respondent’s answer denied the commission of any unfair labor practice.

A conference call was held on May 28, 1999 during which the

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parties argued General Counsel’s motion in limine and the Union’s motions to quash and to reschedule the hearing. During the call the parties were warned that the case might prove to be an appropriate vehicle for oral argument and a bench decision. At my request, General Counsel and Respondent thereafter submitted legal authorities bearing on the motion in limine.

A hearing was held before me in Seattle, Washington on June 2 and 3, 1999. At the conclusion of evidentiary presentations, oral argument was heard.

Respondent, which is a wholly-owned subsidiary of Wabash National Corporation, owns and operates a number of trailer service and repair facilities throughout the country, including one in Seattle, Washington.

¹ I received the record on June 17, 1999.

During the twelve months preceding issuance of the complaint Respondent in the course of its business purchased and received in Washington goods and materials valued in excess of \$50,000 from outside the state, or from suppliers within Washington who had received such goods and materials from outside the state.

Respondent has admitted to be, and I find is, an employer engaged in commerce within the meaning of the Act.

The Union has admitted to be, and I find is, a labor organization within the meaning of the Act.

The following facts were admitted or stipulated:

First, on April 16, 1997 Respondent purchased certain

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assets of Fruehauf Trailer Corporation, hereinafter Fruehauf, including a trailer sales and service facility in Seattle, Washington;

Second, on April 17, 1997 Respondent offered employment to all of the employees previously employed by Fruehauf at the Seattle, Washington facility, and hired a majority of those individuals;

Third, by a letter dated April 29, 1997 Respondent recognized the Union as the exclusive collective bargaining representative of the employees in the following appropriate unit for the purpose of collective bargaining: "All service and maintenance employees, including lead men, at Respondent's Seattle, Washington branch located at 9426 8th Avenue South, excluding parts room, clerical, and supervisory employees as defined in the Act."

I therefore conclude that, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the unit employees.

A November 24, 1997 conversation between employee Marvin Brown, who was the Union shop steward, and admitted supervisor Brett Meeks is alleged by General Counsel to have violated Section 8(a)(1) of the Act. Brown testified that, first, he entered Meeks' office and may have asked the latter about wage increases and profit-sharing benefits enjoyed by employees at Respondent's non-union facilities; second, in response to

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Brown's request for proof, Meeks suggested that Brown call another branch; third, when Meeks thereafter made a call to the comptroller of Respondent's Portland facility, a call which incidentally admittedly dealt with matters not related to the Union, Meeks turned the phone over to Brown who inquired about the benefits available in Portland. In response to a leading question, Brown ultimately confirmed, albeit with some show of uncertainty, that Meeks had stated that the only way to secure such benefits was to be non-union.

Given the context of this conversation, Brown's demonstrably weak memory, and his unsureness as to what was said, I do not find his account to be persuasive. Accordingly, I shall recommend dismissal of the relevant allegation.

In January 1998 Respondent took two of its Seattle employees to its Portland facility. Meeks testified, with some significant support from Brown, that, first, a major warrantee recall for trailer roof repairs for Puget Sound Trucking was being

performed by Respondent's Seattle and Portland facilities; second, the Seattle facility was using tools and techniques unavailable to Portland; and third, the two employees selected for the trip were highly experienced with these tools and techniques. Shop Steward Brown, one of the two selected employees, and Meeks disagreed as to the extent of the tool demonstration performed in Portland.

Meeks' account contained convincing detail, while Brown's

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was vague and unconvincing. I credit Meeks' testimony that the two Seattle employees engaged in at least a short demonstration of two different tools.

Brown further testified that while in Portland he, first, accepted an invitation to attend a short meeting at which profit-sharing checks were distributed; second, the amount of the profit-sharing money per employee was \$125 for a six-month period; and third, he discovered through questioning Respondent's Portland management that non-union status and the attendant lack of protection for probationary employees were obvious drawbacks.

General Counsel contends that the two employees were sent to Portland in order to encourage them to decertify the Union by impliedly promising them benefits for so doing. Respondent's choice of the Union's shop steward to go to Portland makes little sense if Respondent's intention was to secure decertification adherents. Conversely, Respondent's choice of Brown is eminently sensible if its objective was to have an experience employee demonstrate tools with which he was familiar. Of greater significance is the uncontested fact that Respondent never promised profit-sharing benefits to either of the Seattle employees if they got rid of the Union.

Based on all of the foregoing facts, I find that General Counsel's contention is not supported by the preponderance of the evidence.

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During a September 18, 1998 conversation between employee Jim Taylor and non-supervisory lead man Rick Perkins, the latter convinced the former to distribute a decertification petition by arguing that the Union was holding up a wage increase and that employees would get a 50-cent increase when decertification went through. Taylor so testified with convincing detail and with several admissions damaging to the Union's position. Perkins' testimony was confused and self-contradictory.

For the foregoing reasons, and based strongly on the demeanor of both witnesses while on the stand, I credit Taylor on this point.

General Counsel contends that Perkins' comments and actions were attributable to Meeks because the latter was present during the conversation. There appears to be no contention that Meeks actually took part in the conversation concerning wages, profit sharing, or decertification. Taylor candidly admitted that the conversation began when he and Perkins were alone; that Meeks and the other lead man were periodically in and out of the office during the conversation; that he believed Meeks was present for some of the discussion; and that he could not recall,

but thought Meeks was present during the discussion of pay. Taylor's account is simply too tentative and unsure to constitute probative evidence.

Taylor also testified without controversion that he told Meeks on September 18, 1998 that Respondent should offer a

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better medical program, to which Meeks replied he would look into the matter. These comments took place at a time when Taylor had repeated made his personal dissatisfaction with Respondent's health plan known to the company's management. There is no evidence that any other employee was aware of Meeks' comment.

Based on the foregoing facts I conclude that Respondent bypassed the Union in violation of Section 8(a)(5) of the Act.

During oral argument earlier today the Union raised for the first time an argument that Perkins was one of Respondent's supervisors. This contention must be rejected for two reasons: first, it would be a denial of Respondent's right to due process to raise the matter only after the evidentiary record was closed and no chance to defend had been presented; second, the record does not support the Union's contention Perkins was shown to have the same authority over employees as the other lead men whom the Union admits were bargaining unit employees.

Employee Richard Kimberlin testified that he had a conversation with Meeks at a point in time very close to the September 18, 1998 circulation of the decertification petition. During this conversation Meeks commented to the effect that non-union employees could receive a 50-cent raise and profit sharing. Kimberlin was unsure of many of the details surrounding this conversation, although he admitted that his questioning may have elicited Meeks' comment. Kimberlin's

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February 1999 affidavit contains no mention of such a comment by Meeks. Meeks did not recall having such a conversation, but generally denied ever having made such a statement.

While my observation of the witnesses' demeanor requires me to credit Kimberlin over Meeks on the fact that such a conversation took place, Kimberlin's testimony does not foreclose the possibility that Meeks mention of the existence of differing wages and benefits at the Respondent's non-union facilities was made in response to Kimberlin's query. See *Fabric Warehouse*, 294 NLRB 189 (1989). I therefore find that the preponderance of probative evidence has not been shown to establish a violation of the Act.

The record contains no probative evidence in support of the complaint allegation that Meeks suggested in mid-November 1998 that employees might receive wage increases if they got rid of the Union. I therefore reaffirm my earlier dismissal of that allegation.

On November 23, 1998 Perkins filed a decertification petition in Case 19-RD-3392 with an appended showing of interest signed by twenty of the twenty-four unit employees. On November 30th counsel for Respondent wrote a letter to the Union which referenced receipt of a petition signed by a majority of the unit employees as evidence of the Union's lack of majority

support. Explicitly as a consequence of this perceived lack of majority, the letter refused to further participate in

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collective bargaining with the Union, canceled future contract negotiating sessions, and refused to respond to the Unions information requests.

General Counsel argues that this letter constituted an unlawful refusal to bargain and an implicit withdrawal of recognition. Respondent demurs. I conclude that Respondent has not been shown to have withdrawn all of the elements of recognition, but that its letter clearly constitutes an ongoing refusal to bargain with the Union. The remaining question for decision in this case is whether Respondent was justified in so doing.

When Respondent recognized the Union subsequent to purchasing Fruehauf's assets and hiring a majority of its predecessor's employees, the Union was entitled to a presumption of majority support. Respondent can rebut this presumption and withdraw recognition or refuse to bargain if it can establish either that the Union did not, in fact, enjoy majority support, or that Respondent had a good-faith doubt founded on a sufficient objective basis of the Union's lack of majority support. The record contains probative evidence that Respondent had an objective basis for good-faith doubt that the Union no longer possessed majority status in the form of "a copy of a petition, signed by a majority of employees in the bargaining unit, stating that the employees no longer want [the] Union to represent them." See *Master Slack Corp.*, 271 NLRB 78, 81, 85

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(1984).

The Board, however, has long held that an employer is not free to withdraw recognition from a union while there are pending unfair labor practices which are unremedied. At the same time, the Board has found that not every unfair labor practice will be of the character that taints the employer's withdrawal of recognition or refusal to bargain. As the Board stated in *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996), "In cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support."

The case before me involves a single bypassing violation consisting of a single comment to a single employee with no evidence that any other bargaining unit employee ever learned of the comment. This is not the type of refusal to bargain found to have a "significant continuing detrimental impact on employees, causing them to become disaffected from the Union" which was discussed in *Lee Lumber & Building Material Corp.*, supra. Accordingly, it must be determined whether there is specific proof that the violation found herein caused a majority of bargaining unit employees to sign the decertification petition. There is no such proof in the record.

Accordingly, I find that a nexus between Respondent's unfair labor practice and the Union's loss of support has not

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been demonstrated. See *Quazite Corp.*, 323 NLRB 511 (1997). I therefore conclude that Respondent's reliance on the fact that

a majority of its employees no longer wished to be represented by the Union was not tainted by the unfair labor practice found herein. Based on the foregoing I further conclude that Respondent lawfully suspended bargaining on November 30, 1998.

Finally we reach Respondent's argument that because there has been no demonstration of an unfair labor practice postdating the settlement agreement in Case 19-CA-25715, the Regional Director's order setting aside that agreement should be reversed and the settlement agreement reinstated. See *United States Gypsum*, 284 NLRB 4 (1987).

The January 23, 1998 charge and the September 18, 1998 amended charge in 19-CA-25715 appear to encompass all of

the violations of Section 8(a)(1) alleged to have occurred prior to the execution of the settlement agreement by the parties on September 15, 1998, but those charges make no reference to the 8(a)(5) bypassing violation found herein. Accordingly, if I were to reverse the Regional Director's order there would be no effect, remedial or otherwise, on the outcome of this hearing. I therefore find Respondent's argument to be moot.

An appropriate order will issue upon my receipt of the transcript.

Any questions?

MR. DUNHAM: Nope.